Supreme Court, U. S.
FILED
AUG 27 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A Corporation,

Petitioner,

vs.

SANDRA WETZEL and MAMI ROSS, on behalf of Themselves and All Others Similarly Situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR NEW YORK STATE DIVISION OF HUMAN RIGHTS AS AMICUS CURIAE

HENRY SPITZ, *General Counsel*
State Division of Human Rights
270 Broadway
New York, New York 10007
Attorney for Amicus Curiae
(212) 488-5377

ANN THACHER ANDERSON
PAUL HARTMAN
Of Counsel

307 BAR PRESS, Inc., 132 Lafayette St., New York 10013 – 966-3906
(4482)

TABLE OF CONTENTS

	PAGE
Interest of the Amicus	1
Prior Opinions	5
Jurisdiction	5
Statute Involved	5
Question Presented	5
Point I—Nothing in *Geduldig* v. *Aiello* invalidates the decision below or the administrative guidelines therein sustained	6
Point II—*Griggs* v. *Duke Power Co.* furnishes the appropriate test for reviewing the decision below	15
Conclusion	21

TABLE OF AUTHORITIES

Cases: PAGE

Armour & Co. v. Wantock, 323 U.S. 126 (1944, *rehearing denied,* 323 U.S. 818 (1945) 9

Bd. of Educ. v. Div. of Human Rights, 42 App. Div. 2d 48 (Second Dept. 1973), *affirmed,* 35 N.Y.2d 673 (1974) 2
Board of Education of the City of New York v. State Division of Human Rights, 42 App. Div. 2d 854 (Second Dept. 1973), *affirmed,* 35 N.Y.2d 675 (1974) 2
Board of Education of Union Free School District No. 22 v. State Division of Human Rights, 42 App. Div. 2d 600 (Second Dept. 1973), *affirmed,* 35 N.Y. 2d 677 (1974) 2

Cedar Rapids Community School District v. Parr, 227 N.W.2d 486 (Iowa 1975) 11, 19
Cohens v. Virginia, 6 Wheat. (U.S. 1821) 9
Communications Wkrs. v. American T. & T. Co., L.L. Dept., 513 F.2d 1024 (2d Cir. 1975), petition for cert. filed, 43 U.S.L.W. 3684 (June 19, 1975), *reversing* 379 F. Supp. 697 (S.D.N.Y. 1974) 9, 10, 13
Corning Glass Works v. Brennan, 417 U.S. 188 (1974) 12

Dessenberg v. American Metal Forming Co., 8 CCH E.P.D. ¶9575 (N.D. Ohio 1973) 19

Espinoza v. Farah Manufacturing Company, 414 U.S. 86 (1973) 18

Farkas v. South Western City School Dist., 8 CCH E.P.D. ¶9619 (S.D. Ohio 1974), *affirmed,* 506 F.2d 1400 (6th Cir. 1974) 19

PAGE

Geduldig v. Aiello, 417 U.S. 484 (1974) 2, 3, 6, 7, 8, 10, 11, 14, 15
Gilbert v. General Electric Company, 375 F.Supp. 367 (E.D. Va. 1974), *affirmed,* —— F.2d ——, BNA Daily Labor Report No. 126, D-1 (4th Cir. 1975), *petition for cert. filed,* 43 U.S.L.W. 3675 (June 17, 1975) 10, 19
Goerart v. Cleary, 335 U.S. 464 (1948) 13
Goodyear Tire & Rubber Co. v. Rubber Workers Local 200, 8 CCH E.P.D. ¶9657 (Ohio Ct. App. 1974) 19
Griggs v. Duke Power Co., 401 U.S. 424 (1971) 8, 11, 15, 16, 17, 21

Humphrey's Executor v. United States, 295 U.S. 602 (1935) 10

Kahn v. Shevin, 416 U.S. 351 (1974) 12
Krause v. Sacramento Inn, 479 F.2d 988 (9th Cir. 1973) 13

Lillo v. Plymouth Local Bd. of Educ., 8 CCH E.P.D. ¶9510 (N.D. Ohio 1973) 19

Muller v. Oregon, 208 U.S. 412 (1908) 12

Newmon v. Delta Airlines, Inc., 475 F.2d 768 (5th Cir. 1973), *remanded and final order entered,* 374 F. Supp. 238 (N.D. Ga. 1973) 19

Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) 8
Potlatch Forests, Inc. v. Hays, 318 F.Supp. 1368 (E.D. Ark. 1970), *affirmed,* 465 F.2d 1081 (8th Cir. 1972) 20

Railway Mail Association v. Corsi, 326 U.S. 88 (1945) 4
Ray-O-Vac v. Wisconsin Dept. of Industry, Labor and Human Relations, 8 CCH E.P.D. ¶9656 (Wis. Cir. Ct. 1974) 19

PAGE

Richards v. Griffith Rubber Mills, 300 F.Supp. 338 (D. Ore. 1969) 13-14
Robinson v. Lorillard Corporation, 444 F.2d 791 (4th Cir. 1971) 20

Sale v. Waverly-Shell Rock Board of Education, 390 F. Supp. 784 (N.D. Iowa 1975) 10-11, 19
Satty v. Nashville Gas Company, 384 F. Supp. 765 (M.D. Tenn. 1974) 11
Schattman v. Texas Employment Commission, 459 F. 2d 32 (5th Cir. 1972) 13

Udall v. Tallman, 380 U.S. 1 (1965) 18
Unemployment Comm. v. Aragon, 329 U.S. 143 (1946) 18
Union Sch. Dist. v. Human Appeal Bd., 35 N.Y.2d 371 (1974), *reargument denied*, 36 N.Y.2d 807 (1975) 2, 3, 11, 19
United Gas Improvement Co. v. Continental Oil Co., 381 U.S. 392 (1965) 10
United States v. Neifert-White Co., 390 U.S. 228 (1968) 10

Vick v. Texas Employment Commission, 6 CCH E.P.D. ¶8933 (S.D. Tex. 1973) 13, 19
Vineyard v. Hollister Elementary School District, 64 F.R.D. 580 (N.D. Cal. 1974) 10, 19

Weeks v. Southern Bell Telephone and Telegraph Company, 408 F.2d 228 (5th Cir. 1969) 13
Weinberger v. Wiesenfeld, —— U.S. ——, 95 S.Ct. ——, 43 L.Ed. 2d 514 (1975) 20
West Coast Hotel v. Parrish, 300 U.S. 379 (1937) 12
Wetzel v. Liberty Mutual Ins. Co., 372 F.Supp. 1146 (W.D. Pa. 1974), *reargument denied*, 372 F.Supp. 1163 (W.D. Pa. 1974), *affirmed*, 511 F.2d 199 (3d Cir. 1975), *cert. granted*, —— U.S. —— (May 27, 1975) 5, 14
Williamson v. Lee Optical Co., 343 U.S. 483 (1955) 6

Constitutions & Statutes: PAGE

Equal Protection Clause, U.S. Const. XIV Amend. ..6, 12, 13

N.Y. Const. Art. I §11 1

Age Discrimination in Employment Act, 81 Stat. 602, 29 U.S.C. §621 ff. 12

Equal Pay Act, 77 Stat. 56, 29 U.S.C. §206(d) 12

Rehabilitation Act of 1973, 87 Stat. 355, 29 U.S.C. §701 ff. 12

Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. §2000e *et seq.* as amended by Equal Employment Opportunity Act of 1972, 86 Stat. 103 .... 3, 4, 5, 8, 10, 12, 13, 15, 17, 18

28 U.S.C. §1254(1) 5

N.Y. Disability Benefits Law (Workmen's Compensation Law Art. 9) ..... 3 fn.

N.Y. Executive Law Art. 15 2

L. 1945 ch. 118 1

L. 1965 ch. 516 2

Regulations:

EEOC Guidelines as to Sex Discrimination, 29 C.F.R. §1604 ..... 3, 4, 8, 10, 17

N.Y. State Division of Human Rights, Rulings on Inquiries (September 1973) 3, 4

Miscellaneous: PAGE

EEOC 5th Annual Report 18

EEOC 6th Annual Report 18

H.R. Rep. No. 92-238, 92nd Cong. 1st Sess. (1971) as set out in 2 U.S. Code Cong. & Adm. News 2137 (1972) 17

Note, "*Geduldig* v. *Aiello*: Pregnancy Classifications and the Definition of Sex Discrimination," 75 *Colum. L. Rev.* 441 (1975) 11, 17-18

N.Y. Times, March 20, 1975 p. 1 col. 2-4 20

IN THE

Supreme Court of the United States

October Term, 1975

No. 74-1245

LIBERTY MUTUAL INSURANCE COMPANY,
A Corporation,

Petitioner,

vs.

SANDRA WETZEL and MARI ROSS, on behalf of Themselves and All Others Similarly Situated,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR NEW YORK STATE DIVISION OF HUMAN RIGHTS AS AMICUS CURIAE

Interest of the Amicus

The New York State Division of Human Rights is the nation's oldest fair employment practices agency. The Division was created in 1945 in exercise of the state's police power for the protection of the public welfare, health and peace of its people, and in fulfillment of the provisions of the Constitution of the State of New York, N.Y. Const. Art. I, §11, concerning civil rights. L. 1945 ch. 118. Over

the years the jurisdiction of the Division has been enlarged; the Division's jurisdiction over sex discrimination derives from legislation which became effective September 1, 1965. L. 1965 ch. 516. The opportunity to obtain employment without such discrimination has been declared a civil right. N. Y. Executive Law Art. 15 (known as the Human Rights Law) §291.1. The Division's jurisdiction over sex discrimination in employment covers hiring, discharge, and terms, conditions and privileges of employment, including compensation. Human Rights Law §296.1(a).

The Division has published rulings under the Human Rights Law which equate with discrimination based on sex an employer's differentiating between employees on the basis of pregnancy. These rulings include provisions designedly resembling the guidelines of the EEOC which are in issue here. The Court of Appeals of the State of New York has unanimously sustained that interpretation of the statute. *Union Sch. Dist.* v. *Human Appeal Bd.*, 35 N.Y.2d 371 (1974), *reargument denied*, 36 N.Y.2d 807 (1975); *Bd. of Educ.* v. *Div. of Human Rights*, 42 App. Div. 2d 49 (Second Dept. 1973), *affirmed*, 35 N.Y. 2d 673 (1974); *Board of Education of Union Free School District No. 22* v. *State Division of Human Rights*, 42 App. Div. 2d 600 (Second Dept. 1973), *affirmed*, 35 N.Y.2d 677 (1974); *Board of Education of the City of New York* v. *State Division of Human Rights*, 42 App. Div. 2d 854 (Second Dept. 1973), *affirmed*, 35 N.Y. 2d 675 (1974).

In the first-cited case, the court held the decision of this court in *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), "irrelevant" to the question whether an employer may dis-

allow accrued sick leave to an employee disabled by childbirth. 35 N.Y. 2d at 376.

All the cases cited above were decided after *Geduldig* v. *Aiello, supra,* and after argument as to its impact. They upheld orders of the Division directing employers to allow employees to continue working during pregnancy until the onset of actual physical disability, to return to employment upon recovery from such disability, and to receive accrued sick leave, disability benefits and other fringe benefits during the period of actual disability. The courts of the State of New York have thus agreed with the Division's ruling that differentiation by an employer between employees on the basis of pregnancy or maternity, whether as to commencement or continuance of leave or as to allowance of fringe benefits, including disability benefits,* constitutes discrimination as to sex.

The Division argues in this brief that the court below was correct in reading the decision of this Court in *Aiello* not to preclude a finding that an employer who excludes maternity-related disabilities from contractual benefits violates Title VII. The interest of the Division in this proceeding, however, goes beyond *Aiello*. Even if this Court should reverse the decision below, the Division is bound by the decisions cited above, and will therefore persist in equating with discrimination as to sex an employer's differentiation between employees on the basis of pregnancy or maternity. In so persisting, the Division will

* Presently before the Appellate Division is the question whether exclusion of pregnancy-related disabilities from the New York Disability Benefits Law, Workmen's Compensation Law, Art. 9, precludes a finding that an employer's disallowance of contractual disability benefits to an employee disabled by pregnancy violates the Human Rights Law.

reflect the State's determination, expressed in the Human Rights Law and in authoritative interpretation of that Law, "to extend the area of non-discrimination beyond that which the Constitution itself exacts", Frankfurter, J., concurring, in *Railway Mail Association* v. *Corsi,* 326 U.S. 88, 98 (1945).

Reversal by this Court of the decision below, however, would preclude the Federal courts and the Equal Employment Opportunity Commission from making the same equation in interpreting and applying Title VII. The consequences would be anomalous and unfortunate: Title VII, although similar to the Human Rights Law in terms, purpose and legislative intent, would have to be read differently. Its prohibitions against discrimination as to sex could not be applied to employers reducing or curtailing fringe benefits for employees disabled by reason of maternity. The Division would possess wider enforcement power over sex discrimination than the Federal government. This anomaly would confuse and inconvenience employers as well as persons claiming to be aggrieved of such discrimination. And if this Court were to strike down the guidelines of the EEOC requiring equal treatment of maternity-related disabilities and other disabilities, this would adversely affect the Division's strong reliance upon those guidelines in the interpretation and application of its own statute. Having based its own rulings upon those guidelines, the Division has an interest in their being sustained by this Court.

Prior Opinions

The opinion of the Court of Appeals for the Third Circuit is reported at 511 F.2d 199 (1975).

The opinion of the District Court for the Western District of Pennsylvania is reported at 372 F.Supp. 1146 (1974). The memorandum order of that court denying petitioner's motion for reconsideration is reported at 372 F.Supp. 1163 (1974).

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit affirming the judgment of the District Court of the Western District of Pennsylvania was entered on February 11, 1975. The petition for writ of certiorari was filed on April 2, 1975 and granted on May 27, 1975. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Statute Involved

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964, Act of July 2, 1964, 78 Stat. 253, 42 U.S.C. §2000e-2(a)(1).

Question Presented

Whether Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(1), is violated by a private employer which provides wage maintenance for nonoccupational disabilities of employees, but excludes from coverage disabilities caused by or related to pregnancy.

POINT I

Nothing in *Geduldig* v. *Aiello* invalidates the decision below or the administrative guidelines therein sustained.

In *Geduldig* v. *Aiello*, 417 U.S. 484 (1974), this Court upheld under the Equal Protection Clause of the Fourteenth Amendment a state statute providing an employee-funded program of disability benefits which excludes disabilities relating to normal pregnancy. The majority regarded the statutory exclusion of such disabilities as constitutionally permissible, and held that, consistently with the Equal Protection Clause, a state which enacts remedial legislation or establishes a social welfare program may, in the words of *Williamson* v. *Lee Optical Co.*, 343 U.S. 483, 489 (1955), "take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind" and may "select one phase of one field and apply a remedy there, neglecting the others." The cost of adding to the statutory coverage disabilities relating to normal pregnancy was found by the majority to constitute a rational basis for the exclusion. 417 U.S. at 495. The majority noted the state's legitimate interest in maintaining the self-supporting nature of its insurance program, in distributing adequate benefits for those disabilities within coverage, rather than covering all disabilities inadequately, and in maintaining a contribution rate at a level that would not unduly burden participating employees, and declared these policies to provide "an objective and wholly noninvidious basis for the State's decision not to create a more comprehensive insurance program than it has." 417 U.S. at 496. Finding

no evidence that the selection of risks insured by the program worked to discriminate against any definable group or class "in terms of the aggregate risk protection derived by that group or class from the program", the majority went on to say:

> "The dissenting opinion to the contrary, this case is * * * a far cry from cases like *Reed* v. *Reed* and *Frontiero* v. *Richardson* involving discrimination based upon gender as such. The California insurance program does not exclude anyone from benefit eligibility because of gender but merely removes one physical condition—pregnancy—from the list of compensable disabilities. While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex based classification like those considered in *Reed* and *Frontiero*. normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.
>
> "The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes." 417 U.S. 496 n. 20 (citations omitted.)

The majority opinion found in the California program "no risk from which men are protected and women are not." 417 U.S. at 496-7.

Petitioner argues that the majority opinion in *Aiello* furnishes the appropriate test for determining whether petitioner's wage maintenance plan is discriminatory as to sex. Petitioner argues, further, that its plan passes that test.

Aiello, however, is a pronouncement as to the constitutionality of a statutory classification in benefits legislation, not an interpretation or application of Title VII or other fair employment legislation. *Aiello* declares that a state legislature in framing an employee-funded program of benefits for non-occupational disabilities, may regard pregnancy as a legitimate, constitutionally permissible classification, and may either include or exclude pregnancy-related disabilities. *Aiello* does not reach the question whether under fair employment legislation, the constitutionality of which is not in question, an employer may differentiate as to fringe benefits between employees who are pregnant and those who are not. *Aiello* did not arise under fair employment legislation or deal with a practice within any employer's control. *Aiello* does not overrule or modify the leading interpretations of Title VII, *e.g. Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), or *Phillips* v. *Martin Marietta Corp.,* 400 U.S. 542 (1971). *Aiello* does not even refer to Title VII or to the guidelines of the EEOC prohibiting employers from providing less favorable benefits for employees disabled by pregnancy than for employees disabled by illness or injury.

As the Second Circuit recognized in *Communications Wkrs.* v. *American T. & T. Co., L.L. Dept.,* 513 F.2d 1024, 1028 (1975), *petition for cert. filed,* 43 U.S.L.W. 3684 (June 19, 1975), *reversing,* 379 F. Supp. 697 (S.D.N.Y. 1974), words in the opinions of this Court must be read in their proper factual context. *E.g., Cohens* v. *Virginia,* 6 Wheat. 264, 399-400 (U.S. 1821) (Marshall, C.J.):

> "It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

More than a century later, Justice Jackson, writing for a unanimous court in *Armour & Co.* v. *Wantock,* 323 U.S. 126, 132-3 (1944), *rehearing denied,* 323 U.S. 818 (1945), sounded the same warning:

> "It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion. To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court. General expressions transposed to other facts are often misleading."

See also *Humphrey's Executor* v. *United States*, 295 U.S. 602, 626 (1935); *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U.S. 392, 404 (1965); *United States* v. *Neifert-White Co.*, 390 U.S. 228, 231 (1968).

On these authorities, the Second Circuit refused to read *Aiello* as adjudicating the responsibilities of an employer under Title VII towards employees disabled by pregnancy or childbirth. *Communications Wkrs.* v. *American T. & T. Co., L.L. Dept., supra.* The court said, Bryan, J., 513 F.2d at 1030:

> "If, as the district court below thought, *Aiello* was a definitive holding that, absent mere pretext, disparity of treatment of pregnancy-related disabilities could not constitute a violation of Title VII, *Aiello* would substantially circumscribe the reach of that Act of Congress and would invalidate the guidelines as to treatment of pregnancy disabilities issued by the EEOC. It is inconceivable that the majority opinion intended so to hold without even a mention of Title VII or the guidelines."

The Division respectfully submits that the decision of the Second Circuit is correct, reinforces the decision below, and should be followed by this Court.

Other Federal courts agree with the Second and Third Circuits that *Aiello* does not reach Title VII or the guidelines issued by the EEOC. *Gilbert* v. *General Electric Company*, 375 F. Supp. 367 (E.D. Va. 1974), *affirmed*, —— F.2d ——, BNA Daily Labor Report No. 126, D-1 (4th Cir. 1975), *petition for cert. filed*, 43 U.S. Law Week 3675 (June 17, 1975); *Vineyard* v. *Hollister Elementary School District*, 64 F.R.D. 580 (N.D. Cal. 1974); *Sale* v. *Waverly-Shell Rock*

Board of Education, 390 F. Supp. 784 (N.D. Iowa 1975); *Satty* v. *Nashville Gas Company*, 384 F. Supp. 765 (M.D. Tenn. 1974). The highest courts of two states have declared *Aiello* "irrelevant" and "factually and rationally distinguishable" in concluding that denial of sick pay and disability benefits to employees disabled by pregnancy and childbirth violates state fair employment legislation. *Union Sch. Dist.* v. *Human Appeal Bd.*, 35 N.Y.2d 371, 376 (1974), *reargument denied*, 36 N.Y.2d 807 (1975); *Cedar Rapids Community School District* v. *Parr*, 227 N.W.2d 486, 494 (Iowa 1975).

Under *Aiello*, a statutory classification as to pregnancy appears presumptively constitutional, and will not be disturbed unless found to be without rational basis or irrelevant to the achievement of some permissible state purpose. This test is more demanding than the test for ascertaining discrimination under a fair employment statute. Under the rule in *Griggs* v. *Duke Power Co., supra*, 401 U.S. at 431, the test for ascertaining statutory discrimination is simply whether the practice "operates to exclude" employees of a particular race, color, religion, sex or national origin, and if so, whether the employer can prove the practice related to job performance or business necessity. The test for statutory violation looks to effect. The test for constitutionality looks to legislative purpose and intent, and does not always include "effect analysis". *Cf.* Note, "*Geduldig* v. *Aiello*: Pregnancy Classifications and the Definition of Sex Discrimination," 75 *Colum.L.Rev.* 441 (1975).

In two recent decisions this Court has demonstrated how wide is the difference between the standard for deter-

mining the constitutionality of a statutory distinction between men and women and the standard for reviewing decisions under fair employment legislation. *Kahn* v. *Shevin*, 416 U.S. 351 (1974), upheld as constitutional a Florida statute allowing a tax exemption to widows but not to widowers. *Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974), construed the Equal Pay Act to require an employer to pay female inspectors on the day shift as much base pay as paid to male inspectors on the night shift.

To hold that pregnancy is a classification permissible under the Equal Protection Clause is not to hold either Congress or the EEOC foreclosed from forbidding employers to differentiate between employees who are pregnant and employees who are not. A classification permissible to lawmakers under the Equal Protection Clause in the framing of social welfare legislation can be legislatively forbidden to employers. Much fair employment legislation goes beyond the classifications regarded as suspect under the Equal Protection Clause—race, color, creed—and reaches classifications which are presumptively constitutional. Quite apart from Title VII, the Age Discrimination in Employment Act, 81 Stat. 602, 29 U.S.C. §621 ff., and the Rehabilitation Act of 1973, 87 Stat. 355, 29 U.S.C. §701 ff., forbid employers from differentiating between employees on the basis of age or handicap—classifications which under the Constitution are subject only to limited judicial scrutiny.

Muller v. *Oregon*, 208 U.S. 412 (1908) and *West Coast Hotel* v. *Parrish*, 300 U.S. 379 (1937), which upheld as constitutional protective legislation as to women, did not preclude the Fifth Circuit from declaring discriminatory, and hence invalid under Title VII, sex-based prerequisites for employment. *Weeks* v. *Southern Bell Telephone and Telegraph Company*, 408 F.2d 228 (5th Cir. 1969). *Goesart* v. *Cleary*, 335 U.S. 464 (1948), upholding under the Equal Protection Clause state legislation forbidding women from tending bar, did not preclude a lower Federal court from characterizing an employment policy based on such a statute as patently offensive under Title VII. *Krause* v. *Sacramento Inn*, 479 F.2d 988 (9th Cir. 1973). The holding in *Schattman* v. *Texas Employment Commission*, 459 F.2d 32 (5th Cir. 1972), that a regulation issued by an employer not then subject to Title VII was permissible under the Equal Protection Clause did not preclude a lower court from subsequently holding the regulation invalid under amendments extending Title VII to cover the employer. *Vick* v. *Texas Employment Commission*, 6 CCH E.P.D. ¶8933 (S.D. Tex. 1973).

In the *Communications Workers* case, *supra*, the Second Circuit said, 513 F.2d at 1031:

> "Title VII is legislation of this nature, designed to prohibit a broad spectrum of discriminatory evils which Congress deemed would have such an adverse effect. There is no requirement that the discriminatory practices forbidden by this Statute should be limited to practices violative of the Equal Protection Clause. Practices forbidden by Title VII and the EEOC guidelines issued thereunder may, nonetheless, be able to survive Equal Protection attack."

See *Richards* v. *Griffith Rubber Mills*, 300 F. Supp. 338, 340 (D. Ore. 1969), where the court applied Title VII to an

order of the state wage and hour administrator and said: "The particular classification in Order No. 8 may be reasonable under the Equal Protection Clause, but it is no longer permitted under the Supremacy Clause and the Equal Employment Opportunity Act."

The Division respectfully submits that the District Court in this case was correct in stating, 372 F. Supp. at 1159:

> "While a fixed State policy of classification may survive an equal protection attack it may still be violative of Title VII."

Aiello upholds not only the exclusion but also the inclusion of pregnancy within legislative coverage. *Aiello* specifies that lawmakers are Constitutionally free to "include" pregnancy within legislative coverage "on any reasonable basis." 417 U.S. at 496 n.20. Under *Aiello* it is therefore permissible for an administrative agency to interpret fair employment legislation as declaring maternity-related disabilities to be like other temporary disabilities and as prohibiting employers from treating them differently. The Division and the EEOC interpret their respective fair employment statutes as doing just that.

To read *Aiello* as requiring reversal of the decision below would impose upon persons claiming to be aggrieved by disparities in fringe benefits for maternity-related and other disabilities an unduly heavy burden of proof. Instead of looking to the effect of such disparities, leaving to employers the burden of justifying them on the basis of business necessity, complainants would have to show invidious

discrimination based upon the employer's intent to discriminate. The aggrieved person would bear as heavy a burden of proof as someone challenging the constitutionality of a statute. The Division respectfully submits that such a reading of *Aiello* misconceives the appropriate standard for proving discrimination and conflicts head-on with *Griggs* v. *Duke Power Co., supra* and with *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973).

POINT II

Griggs v. *Duke Power Co.* furnishes the appropriate test for reviewing the decision below.

Petitioner does not challenge the constitutionality of Title VII, but raises only the question how the statute should be applied (Brief for Petitioner p. 2). Under *Griggs* v. *Duke Power Co.,* 401 U.S. 424 (1971), the appropriate test in this context is the effect of the employment practice upon the persons Title VII was enacted to protect. If petitioner's practice "operates to exclude" women, *Id.* at 431, then, unless it can be shown to be related to job performance or justified by business necessity, the practice is discriminatory as to sex.

The Division respectfully submits that this case is the counterpart, under the statutory prohibition against discrimination as to sex, of *Griggs* and its application of the statutory prohibition against discrimination as to race and color. The factual distinctions between this case and *Griggs* do not warrant a different reading or application of the statute.

Like the pre-employment requirements in *Griggs* (test scores and a high school diploma), petitioner's wage maintenance plan is neutral on its face. The pre-employment requirements in *Griggs* did not exclude blacks as such but only those persons, white as well as black, who did not measure up. Similarly, petitioner's wage maintenance plan does not disfavor female employees as such, but only those employees (necessarily female) who are disabled by pregnancy and childbirth. Like the pre-employment requirements, which operated to exclude blacks from employment, petitioner's wage maintenance plan operates to exclude women from fringe benefits, which are part of the fruits of employment.

In two respects this is a clearer case of discrimination even than *Griggs*. The exclusionary impact there affected blacks disproportionately but not uniquely: white applicants, too, were excluded. Here, the exclusionary impact is unique to women, and widespread among them, because so many female employees are of childbearing age. Furthermore, there is an even more obvious connection between sex and pregnancy than there is between race and test scores.

Petitioner concedes that exclusion from an employer's income maintenance plan of certain nonoccupational disabilities unique to blacks (sickle-cell anemia) or to Jews (Tay-Sachs) would be discriminatory (Brief for Petitioner pp. 15-16 n. 26). The exclusionary impact would not fall on all black or Jewish employees but only on those who suffer from the disabiltiy. On this analysis, exclusion of a disability unique to men (hemophelia) would be discriminatory. It follows necessarily that exclusion of a disability unique to women is discriminatory.

Petitioner has not shown how the exclusion of pregnancy-related disabilities from its wage maintenance plan is connected with job performance or justified by business necessity. Petitioner's argument as to cost does not discharge the burden of explanation. Indeed, petitioner has conceded that there is "no reliable basis to estimate the cost of providing pregnancy-related disability benefits due to, *inter alia*, the enormous difficulty of accurately assessing the bona fide period of real disability" (Appendix p. 194).

Accordingly, it was reasonable for the courts below to apply the guidelines of the EEOC equating with sex discrimination an employer's differentiation between employees on the basis of pregnancy, and ruling out cost as a defense to a charge of discrimination in fringe benefits.

This Court has ruled the guidelines of the EEOC to be entitled to "great deference" on review and, insofar as supported by the language and history of Title VII, to acceptance as expressing the will of Congress. *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 434. The EEOC's guidelines as to pregnancy were not published until March 30, 1972, 37 Fed. Reg. 6835, effective April 5, 1972. Their publication followed by a few days enactment of the Equal Employment Opportunity Act of 1972, Act of March 24, 1972, 86 Stat. 103, by which Congress amended Title VII. The guidelines are therefore not mentioned in the legislative history of the amendment. That history, however, expresses strong concern over the prevalence of sex discrimination in employment. H.R. Rep. No. 92-238, 92nd Cong. 1st Sess. (1971) as set out in 2 U.S. Code Cong. & Adm. News 2137, 2140, 2141 (1972); see Note, "*Geduldig* v. *Aiello*:

Pregnancy Classifications and the Definition of Sex Discrimination," 75 *Colum. L. Rev.* 441, 464 (1975). Nothing in the history of the 1972 amendments to Title VII expresses intent to exclude or exempt employment practices relating to pregnancy.

Congress relies upon factual analysis by the EEOC of discriminatory policies and practices on the part of employers. Such analysis is furnished in the agency's annual reports. These reports have included findings by the EEOC that differentiation by an employer between employees who are pregnant and those who are not is sex discrimination. See, *e.g.*, EEOC 5th Annual Report (year ending June 30, 1970) p. 14; 6th Annual Report (year ending June 30, 1971) pp. 11-12. Enactment of the Equal Employment Opportunity Act of 1972 was based, in part, on the work of the EEOC on problems of sex discrimination. There is no indication Congress disagreed with the EEOC's equation of an employer's differentiation as to pregnancy with discrimination as to sex.

Petitioner relies on *Espinoza* v. *Farah Manufacturing Company,* 414 U.S. 86, 94-5 (1973) to question the EEOC's guidelines as to pregnancy. *Espinoza* holds only that deference will not be given an administrative interpretation where there are "compelling indications that it is wrong." There is no such indication here. On the contrary: there are indications that the guidelines properly interpret the will of Congress. Even if legislative intent is unclear, an agency's interpretation is entitled to deference if it promotes the objectives of the statute. See *Unemployment Comm.* v. *Aragon,* 329 U.S. 143, 153 (1946); *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965).

The predominance of decisions under fair employment legislation is in accord with the guidelines of the EEOC as to pregnancy, and requires employers to provide with respect to maternity-related disabilities the same benefits provided with respect to other disabilities. *Gilbert* v. *General Electric Company, supra; Farkas* v. *South Western City School Dist.,* 8 CCH E.P.D. ¶9619 (S.D. Ohio 1974), *affirmed,* 506 F.2d 1400 (6th Cir. 1974); *Dessenberg* v. *American Metal Forming Co.,* 8 CCH E.P.D. ¶9575 (N.D. Ohio 1973); *Lillo* v. *Plymouth Local Bd. of Educ.,* 8 CCH E.P.D. ¶9510 (N.D. Ohio 1973); *Vick* v. *Texas Employment Comm'n, supra; Vineyard* v. *Hollister Elementary School District, supra; Sale* v. *Waverly-Shell Rock Board of Education, supra; Union Sch. Dist.* v. *Human Appeal Bd., supra; Cedar Rapids Community School District* v. *Parr, supra; Goodyear Tire & Rubber Co.* v. *Rubber Workers, Local 200,* 8 CCH E.P.D. ¶9657 (Ohio Ct. App. 1974). *Contra*: *Ray-O-Vac* v. *Wisconsin Dept. of Industry, Labor and Human Relations,* 8 CCH E.P.D. ¶9656 (Wis. Cir. Ct. 1974).

Petitioner relies on one Federal case, *Newmon* v. *Delta Airlines, Inc.,* 475 F.2d 768 (5th Cir. 1973), *remanded and final order entered,* 374 F. Supp. 238 (N.D. Ga. 1973), which can be read as disallowing sick leave benefits for maternity-related disabilities. However, it is not clear from the court's opinion that the plaintiff limited her claim to the period of actual disability. She may have claimed benefits for the entire term of pregnancy without regard to disability. The court, relying on and construing the EEOC's guideline, found in it no equation of disability with pregnancy as such.

The EEOC's guideline as to cost is also reasonable in the context of this case. The courts have ruled that avoidance of expense of changing employment practices is not a business purpose that will validate differential effects of unlawful employment practices. *Robinson* v. *Lorillard Corporation,* 444 F.2d 791, 799 n.8, 800 (4th Cir. 1971); *Potlatch Forests, Inc.* v. *Hays,* 318 F. Supp. 1368, 1375 (E.D. Ark. 1970), *affirmed,* 465 F.2d 1081 (8th Cir. 1972). In deciding *Weinberger* v. *Wiesenfeld,* —— U.S. ——, 95 S. Ct. ——, 43 L. Ed.2d 514 (1975), this Court did not hesitate to require equal benefits for survivors of male and female workers under the Social Security Act, despite the high cost to the Government of increasing benefits. N.Y. Times, March 20, 1975 p. 1 col. 2-4. The Division's experience with fringe benefits suggests that most employers' plans permit adjustment to reflect limitations on available resources. The Division respectfully submits that fair employment legislation is less concerned with the size of the pie than with nondiscriminatory distribution of the slices.

Conclusion

This case offers the Court an opportunity to reaffirm and reapply one of its most respected and frequently cited decisions. By specifically holding that the *Griggs* case is the measure of sex discrimination no less than of race discrimination, this Court will reinforce efforts of the legislative and executive branches of the Federal government to provide equal employment opportunity. Such a holding will assist a reasonable interpretation of state fair employment legislation.

The decision of the Court of Appeals should be affirmed.

Dated: New York, New York
August 29, 1975

Respectfully submitted,

HENRY SPITZ, *General Counsel*
State Division of Human Rights
270 Broadway
New York, New York 10007
Attorney for Amicus Curiae
(212) 488-5377

ANN THACHER ANDERSON
PAUL HABTMAN
Of Counsel